10. SEARCHES OF PERSONS AND "STRIP" SEARCHES

10.1. General Considerations — Following a Step-by-Step Plan of Action to Minimize the Risks and Degree of Intrusion.

The New Jersey Supreme Court in New Jersey v. T.L.O. aptly observed that even a limited search of a person (as opposed to places or containers) is a substantial invasion of privacy. In Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir.) cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (5th Cir.) (1982), the court went even further, noting that, "society recognizes the interests in the integrity of one's person, and the Fourth Amendment applies with its fullest vigor against any indecent or indelicate intrusion on the human body." 677 F.2d at 480. For this reason, school officials, and police officers as well, should be especially cautious before undertaking a search of a student's person.

As with any search, a school official preparing to search a student's person should follow a logical plan of action that is designed to minimize the intrusiveness of the search to the greatest extent possible. See Chapter 3.2B(1) for a more detailed explanation of how to devise a reasonable search plan. Thus, for example, a school official who has reasonable grounds to believe that a student is carrying contraband or evidence of an offense or infraction on his or her person should ordinarily follow these steps in sequence:

1. Bring the student to the principal's office or other location away from other students.

2. Make certain that at least one other school official is present to serve as a witness and to assist in the search if necessary. (Note that any physical touching of the student should generally be done by a staff member of the same sex as the student.)

3. Clearly identify your authority and purpose, indicating the specific kind of object that you are searching for (e.g., a weapon, drugs, etc.).

4. Give the student an opportunity to surrender the sought-after object(s). (Note, turning over illicit drugs at the request of a school official does *not* constitute a "voluntary" act within the meaning of the amnesty provisions of the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) and N.J.A.C. 6:29-10.5(a)(1), and any suspected controlled dangerous substances surrendered during a search must be

provided to police along with the name of the student who was in possession of the substance. See Chapter 14.1C.)

5. Require the student to put down any handbag or backpack and/or to remove outer garments so that these objects can be searched without physically touching the student's person.

6. Require the student to empty his or her pockets unless the sought-after item is a weapon and there is reason to believe that the student might use the weapon to commit an assault. School officials in making this determination should consider the totality of the known circumstances, including the student's present state of mind and reaction to the encounter (e.g., belligerent, cooperative, etc.) and his or her reputation for violence or for resisting authority.

7. Begin any touching of the student's actual person in the place most likely to conceal the sought-after object.

8. Conduct a "frisk" or "patdown" before actually reaching into a pocket to determine whether there is anything present that might be the sought-after object. If this limited tactile search of the outer clothing does not reveal the presence of an object that could be the subject of the search, the school official should not conduct any more invasive search of that location unless the nature of the evidence sought or of the clothing is such that a limited patdown would not in any event have revealed the presence of the sought-after evidence.

9. While conducting a "frisk" or "patdown" of the student's clothing, school officials should not slide or otherwise manipulate an object in a pocket unless the object reasonably could be the item being sought, or unless it is immediately apparent after the initial touching that the item is a weapon or other contraband that you did not expect to find. (See discussion of the "plain feel" doctrine in Chapter 11.)

10. Immediately stop searching when the object of the search is found and secured unless there are reasonable grounds at that moment to believe that the student is carrying yet additional evidence of a serious offense or infraction that would independently justify a search of the person.

10.2. Search of Person and the "Wingspan."

When a police officer lawfully takes a juvenile "into custody" (i.e., arrests the juvenile based upon probable cause to believe that a juvenile has committed an act which, if committed by an adult, would be an offense), the officer is authorized to conduct a contemporaneous search of the juvenile's person, clothing, or any items carried by the juvenile or otherwise within the juvenile's "wingspan," which is defined as the immediate vicinity of the arrest where the juvenile would be able to reach for a weapon or to conceal or destroy evidence. This form of search is known as a "search incident to an arrest," and represents one of the recognized and commonly used exceptions to the warrant requirement. Note that a police officer does not need probable cause to believe that the search will reveal evidence of a crime. Rather, a contemporaneous search of the arrestee is automatically authorized, provided that the arrest is lawful.

While school officials have no authority to "arrest" students for suspected criminal law violations, they are permitted to conduct a search of a student's person — if the search is conducted in a reasonable manner — where there are reasonable grounds to believe that evidence of the infraction or criminal law violation will be found in the course of the search. That, after all, is the essence of the court's ruling in New Jersey v. T.L.O.. Note that with respect to searches conducted by school officials, there is no automatic search "incident to the arrest." If, for example, school officials have reasonable grounds to believe that a student recently committed an assault, they could *not* conduct a search of that student unless they also had reasonable grounds to believe that the search would reveal evidence of that crime (i.e., a weapon that had been used to commit the assault). (See Chapter 3.2A for a more detailed discussion of the "four step" analysis school officials should perform before initiating a search of a particular student.)

As with any search, school officials should use the least intrusive means available to accomplish the legitimate objective of the search. A state statute expressly authorizes both public and private school employees to "use and apply such amounts of force as is reasonable and necessary ... to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil." N.J.S.A. 18A:6-1. Even so, school officials are strongly urged *not* to use force in conducting a search. Where force is necessary and thus authorized, the better practice would be to call the police for assistance.

Where it is at all feasible, moreover, school officials should request the student to produce the sought-after object or to empty his or her pockets, rather than to proceed immediately to physically touch the student. Conducting a physical search of a

student's person, in other words, should only be used as a means of last resort. If the student refuses to comply or resists any physical touching, school officials are strongly encouraged to discontinue the search and notify the police. (See also Chapter 3.2B(8) for a more detailed discussion of the appropriate use of force or threat of force.) It would not be inappropriate in these circumstances for the school official to advise the student that the police will be called and that they will be provided with the information that suggests that the student has committed an offense and is carrying evidence of that offense. In some cases, students when confronted with this warning will agree to empty their pockets or to remove and turn over the sought-after evidence. (Note that this would *not* be a valid consent search, see Chapter 8, but would nonetheless be lawful provided that the school official had reasonable grounds to believe that the student was in possession of contraband or other evidence.)

As a general proposition, when police arrive at the scene, they should assume responsibility for conducting the search, see N.J.A.C. 6:29-10.3(b)(4)(iv), and the lawfulness of the ensuing search would in that event be determined by using the stricter standards governing law enforcement searches (i.e., the probable cause standard and the need for a warrant or recognized exception to the warrant requirement such "search incident to an arrest"). (See Chapter 2.5.) Moreover, when police in any way participate in a search that is actually conducted by school officials, that participation will usually transform the search into a law enforcement activity that will then be subject to the more rigorous standard of judicial review. (See discussion of the so-called "silver platter" doctrine in Chapter 4.5D(4)(a).) One possible exception to this rule might conceivably apply where police are summoned not to conduct the search, but rather only to stand by and guard against the possibility that a student would assault a school staff member while that staff member conducts the search under the more flexible reasonable grounds standard of proof. It is conceivable if not likely, however, given the present state of the law, that courts in this state would consider the mere presence of police officers in these circumstances sufficient "participation" to convert the ensuing search into a law enforcement activity.

When police are not at all involved, the search by school officials need only be justified by the reasonable suspicion standard described in more detail in Chapter 3. School officials should nonetheless understand that precisely because the standard is said to be more "flexible" than the probable cause test used by police, the precise quanta of proof required to satisfy the reasonable grounds standard will vary according to the degree of the privacy intrusion of the contemplated search. Since a physical search of a student's person constitutes the most invasive form of search that a school official may lawfully undertake, it follows that the reasonable grounds standard would be set at its highest level in these circumstances.

In at least one case cited in a footnote in New Jersey v. T.L.O., a court expressly held that a higher standard of justification (approaching full probable cause) applies where the search is "highly intrusive." See M.M. v. Anker, 607 F.2d 588, 589 (2nd Cir. 1979). In other words, as the intrusiveness of a search intensifies, the standard of Fourth Amendment reasonableness approaches probable cause even though the search is conducted by school officials. Compare Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The Anker case involved a "strip search" of a female student for some unidentified stolen object. (As noted in the next subchapter, pursuant to a recently-enacted statute, school officials in New Jersey are now prohibited in any event from conducting a strip search.) Thus, although the general rule is that school officials are permitted to conduct a search based upon reasonable grounds — a less stringent standard of proof than probable cause — school officials should be mindful that courts will more closely scrutinize the facts justifying a search where the search is particularly intrusive, such as one that involves a physical touching of a student's person.

Furthermore, the United States Supreme Court in New Jersey v. T.L.O. expressly warned that the scope of the search must not be "excessively intrusive in light of ... the nature of the suspected infraction." 105 S.Ct. at 735 (emphasis added). This suggests that students should ordinarily not be subjected to a physical touching to find evidence of comparatively minor infractions of school rules, such as chewing gum, candy, or snack foods. Although the Court in T.L.O. made clear that school officials are authorized to enforce *all* school rules, and to conduct reasonable searches to secure evidence of any infraction, school officials must always use common sense and should carefully consider the seriousness of the suspected infraction before conducting a physical search of the student's person or before using force or threat of force to effectuate any such search. In sum, courts are likely to afford school officials more latitude in conducting a search for a suspected gun or switchblade than a search for cigarettes.

In Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, (11th Cir. 1996), the Federal Court of Appeals for the Eleventh Circuit attempted to devise a meaningful scale or ranking of the seriousness of offenses that might justify various levels of privacy intrusion. The court noted:

> It is obvious that an infraction that presents an imminent threat of serious harm — for example possession of weapons or other dangerous contraband — would be the most serious infractions in the school context. Thus, these offenses would exist at one end of the spectrum. Thefts of valuable items or large sums of money would fall a little more toward the center of the spectrum. Thefts of small sums of money or less valuable items and possession of minor, non-dangerous contraband would fall toward the

opposite extreme of the spectrum. Such infractions would seldom, and probably never, justify the most intrusive searches.
[95 F.3d at 1046-1047.]

School officials must be especially cautious in touching a student's crotch area (or female breasts), since such contact constitutes a particularly intrusive form of search. Regrettably, in some jurisdictions, notably Los Angeles, weapons and drugs are routinely concealed by students in the crotch area precisely because students know that school officials will be reluctant to conduct a thorough search that would entail touching the clothing that covers these private parts of the human anatomy. To some extent, baggy, oversized trousers have become popular with gang members precisely because such clothing makes it easier to conceal drugs and weapons.

In any case where the search will involve any physical touching of a student by a school official, the better practice would be to have another school employee present as a witness to reduce the chance that a student would falsely accuse the official of misconduct and also to reduce the likelihood that the student would forcibly resist the search. It is strongly advised that any physical touching be done by a school official of the same gender as the student. Recall also that all searches, *and especially searches of the person*, should be conducted in private and away from other students. See Chapter 3.2B(1).

10.3. "Strip" Searches.

There are few subjects within the field of search and seizure law that are more sensitive and more controversial than the question as to when and under what circumstances governmental officials may conduct a "strip search." Although such conduct by certain governmental officials (i.e., police or corrections officers) may, in certain limited circumstances, be appropriate and even necessary to protect the public, strip searches, without question, constitute a gross invasion of privacy, especially when the subject of a strip search is a child.

Without question, strip searches are among the most intrusive of searches. In MaryBeth G. v. City of Chicago, 723, F.2d 1263, 1272 (7th Cir. 1983), the court referred to strip searches as "demeaning," dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." Moreover, "the perceived invasiveness and physical intimidation intrinsic to strip searches may be exacerbated for children." Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, 1039 (11th Cir. 1996); see also Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992) ("[c]hildren are especially susceptible to possible

traumas from strip searches." (internal quotation marks omitted)). A strip search performed by someone of a different gender from the person searched would be considered significantly more intrusive than a same-sex search. See Jenkins by Hall v. Talladega City Bd. of Educ., supra, 95 F.3d at 1044, n. 15 (11th Cir. 1996).

In In the Interest of T.L.O., the New Jersey Supreme Court minced no words when it observed that:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law."
> [94 N.J. 331, 344 n.6 (1983), quoting from Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980), cert. denied, 451 U.S. 1022, 101 S.Ct. 3015 (1981).]

In response to the New Jersey and Unites States Supreme Court decisions in T.L.O., the Attorney General in 1985 issued School Search Guidelines that concluded that:

> One need not be a constitutional scholar to recognize that students should never be subjected to any conduct even approaching the intensity of a strip search, except in the most urgent, extraordinary and life-threatening situations, such as to seize an observed dangerous weapon or to secure the implements of an imminent suicide attempt.

On September 5, 1997, Governor Whitman signed into law P.L. 1997, c. 242, (N.J.S.A. 18A:37-6.1), which provides in its entirety that, "Any teaching staff member, principal or other educational personnel shall be prohibited from conducting any strip search or body cavity search of a pupil under any circumstances." This legislation was introduced in response to an outrageous situation where third-graders were told to drop their pants so that a school official could search for $23 that was missing.

The new statutory prohibition against strip searches "under any circumstances" applies even where a school official has reasonable grounds to believe that a pupil may have committed an act which if committed by an adult would constitute a criminal offense. It should be noted in this regard that although the original bill specifically

included language to that effect, that clause was deleted from the bill by committee amendment. Even so, the legislative declaration prohibiting teaching staff members, principals, or other educational personnel from conducting *any* strip search or body cavity search of a pupil *under any circumstances* could not be more absolute.

It is not clear, however, whether the new prohibition applies only to public school employees, or whether it also extends to persons employed by nonpublic schools. Certainly the Legislature is free to impose limits on the actions taken by employees of private, parochial, and independent schools in order to afford protections to their students. Thus, for example, the law prohibiting corporal punishment of pupils expressly applies to persons "employed or engaged in a school or education institution, whether public or private ..." N.J.S.A. 18A:6-1 (emphasis added).

The new strip search law, in contrast, includes no such express reference to private schools. The bill as originally introduced included a section that would have imposed a duty to report criminal offenses to a local law enforcement agency on "any teaching staff member, principal, or other educational personnel of any public school in this State." The Assembly Judiciary Committee on May 20, 1996 amended the bill to delete the entire first section, thus removing from the legislation any reference to public schools. The remaining language of the bill that was eventually adopted by the Legislature and signed by the Governor refers only to "any teaching staff member, principal, or other educational personnel." But even if the literal provisions of the new law were to be construed by courts to apply only to public school employees, employees of nonpublic schools should, as a matter of common sense, proceed with great caution before engaging in conduct that would constitute a strip search, since the new law presumably reflects a legislative judgment that such conduct is highly invasive of privacy rights and violates a standard of care that may be owed to *all* schoolchildren under generally accepted principles of tort law.

The new legislation governing searches undertaken by school employees also does not include definitions of the terms "strip search" and "body cavity search." Those terms are nonetheless defined in another law, N.J.S.A. 2A:161A-3 et seq., that imposes significant limitations (but not a total ban) on the authority of police officers to conduct strip or body cavity searches. Specifically, for the purposes of that act, a strip search is defined to mean:

> The removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts. The term does not include any removal or rearrangement of clothing reasonably required to render medical treatment or assistance or

the removal of articles of outer-clothing, such as coats, ties, belts or shoelaces.
[N.J.S.A. 2A:161A-3a.]

The term "body cavity search" is defined to mean, "the visual inspection or manual search of a person's anal or vaginal cavity." N.J.S.A. 2A:161A-3b.

Absent any legislative history or indication to the contrary, it must be assumed that the Legislature by adopting N.J.S.A. 18A:37-6.1 intended to use the same definitions with respect to searches conducted by school officials. Note that the statutory definition of a strip search is substantially broader than a "nude" search. Accordingly, school officials are prohibited from ordering students to remove clothing that would expose *either* undergarments or a nude body. However, school officials would not be prohibited from removing, or ordering students to remove, articles of outer clothing, as defined in the above-quoted statute.

Furthermore, the statutory term "outer clothing" should be construed in light of the recent fashion trend, also inspired by California-based gangs, to wear multiple layers of baggy clothing. A sweater or sweatshirt worn under another sweatshirt, jacket, or vest should not be deemed to be an undergarment unless it is, in fact, in direct contact with the student's skin.

Applying a reasonable interpretation of the new statutory prohibition, a school official should also not be deemed to have conducted a "strip search" if he or she removes a weapon or other contraband from a student's waistband, even if the act of retrieving the object briefly exposes the student's skin or undergarments in the area of the waistband. In other words, the removal of a weapon or other contraband in these circumstances should not automatically or reflexively be construed to constitute the "rearrangement" of the student's clothing, especially when the purpose of such conduct is *not* to conduct a visual or tactile inspection of the person's undergarments, buttocks, anus, genitals, or breasts, but rather to remove and secure (i.e., "seize") an item that had already been observed, admitted to, or detected during a "patdown." (As noted in Chapter 2.2, a "seizure" is deemed to be a lesser form of intrusion than a true "search.") Obviously, the school official in these circumstances should minimize the degree of intrusion so that the exposure or re-arrangement of underclothing is clearly incidental to the official's true purpose, that is, to secure an object the existence and location of which was already known, and school officials are reminded that especially when a weapon is involved, the better practice may be to call the police and permit responding police officers to assume responsibility for conducting the search and seizure. See N.J.A.C. 6:29-10.3b4(ii).

School officials would not be precluded from rearranging or even removing clothing, including undergarments, if that is necessary to render medical assistance, provided that the true purpose is not to search for evidence of a crime.

It goes without saying, moreover, that even in the absence of the new statute, school officials would be precluded from conducting a "body cavity" search. It is simply not possible to conceive of a situation where a less invasive and thus preferable option would not be available to respond to even the most urgent circumstances. Thus, even if school officials had highly-reliable information to suggest that a student was concealing drugs in his or her body cavity and intended to destroy those drugs, or even intended to consume them in an apparent suicide attempt, the correct response would be to restrain the child and call the police or other appropriate emergency response or medical personnel, *not* to reach into the anal or vaginal cavity to retrieve the drugs or to conduct a visual inspection of the orifice to confirm the presence of the drugs.

The term "body cavity" as used in the new statute does not include a student's oral cavity. See N.J.S.A. 2A:161A-3b, which refers specifically to a person's anal or vaginal cavity. Even so, because an oral inspection involves a significantly invasive search, a school official should not order a student to open his or her mouth for visual inspection unless there are strong reasonable grounds to believe that the student is trying to conceal or swallow evidence of a serious infraction or violation of law. Needless to say, a school official may nonetheless order a student to "spit out" something that is obviously in the student's mouth, such as chewing gum, without running afoul of the Federal or State Constitutions. Where the school official reasonably believes that the student has ingested a controlled dangerous substance or any other object or substance that might pose a threat to the student's health, the school official should report the matter immediately and seek appropriate medical assistance. See also Chapter 13.2 specifying the procedures school officials must follow where there is a reason to believe that a student is under the influence of an intoxicating substance.

It is important to note that the new strip search statute prohibits school officials from engaging in less intrusive conduct that, in some circumstances, might not have been unconstitutional. The Legislature, of course, is free to afford students and other citizens greater rights and protections than are minimally guaranteed by the State and Federal Constitutions.

Consider that in Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993), public high school officials conducted a search of a male high school student who was suspected of carrying drugs in his crotch area, based on an observed unusual bulge. Two male school officials accompanied the student to the boys' locker room to conduct the search. The school officials made certain that no one else was present in the locker room and then locked the door to ensure that the search would be conducted in private. The school officials stood at a distance of 10 to 12 feet from the student when they ordered him to remove his street clothes and put on a gym uniform. The school officials visually inspected the student's naked body and physically inspected his clothes. They found no evidence of drugs or any other contraband.

The student filed a civil rights action under 42 U.S.C. § 1983. The Court of Appeals for the Seventh Circuit affirmed the trial court's order granting summary judgment in favor of the school officials. The court in summarily dismissing the lawsuit noted that no one could seriously dispute that a nude search of a child is traumatic. The court nonetheless found that school officials had reasonable grounds to believe that the student was hiding drugs in his crotch area (recall that a search is not unconstitutional merely because no evidence was found), and that the suspicion justified the search in the careful manner in which it was conducted.

In light of the new statute, however, it is clear that this type of conduct is now prohibited in New Jersey if undertaken by school officials. Accordingly, where a school official believes that suspected evidence of a crime could only be revealed by the removal or rearrangement of clothing that would reveal the student's undergarments, buttocks, anus, genitals, or breasts, the correct response is to call the police, who are authorized to conduct a strip search in appropriate circumstances. It is important to note in this regard that the prohibition against strip searching of students contained in the new law applies only to searches undertaken by school officials. Police officers, in contrast, will continue to be bound by the law codified at N.J.S.A. 2A:161A-3 et seq. and guidelines issued by the Attorney General pursuant to that law. (Those guidelines are attached as Appendix 11.)

Although school officials are clearly prohibited from conducting a strip search under the new statute, and thus would be precluded from ordering a student to disrobe or to engage in conduct that would expose the student's undergarments or nude body, school officials are not precluded from directing a student to produce contraband or evidence that happens to be concealed in the student's undergarments. Although the act of ordering a student to produce an object concealed on his or her person clearly constitutes a "search" within the meaning of the Fourth Amendment, such conduct, if actually undertaken by the student himself or herself, would *not* constitute a "strip

search" within the meaning of the new statute, since there would be no touching of the student nor exposure to view of the student's undergarments or nude body.

If the student refuses to produce evidence believed to be concealed in undergarments in response to a request or demand made by a school official who has reasonable grounds to believe that such evidence is present, school officials at that point would be well-advised to call the police. Note, moreover, that school officials would be free to warn the student that if he or she refuses to reveal the object suspected to be present, the police will be summoned to the scene. (Note in this regard that school officials in these circumstances would not be asking for "consent" to search, but rather would be conducting a search pursuant to New Jersey v. T.L.O. based upon reasonable grounds to believe that the student is concealing evidence of a crime.)

Finally, the new statute would not prohibit a school official from conducting a limited patdown of outer clothing (or requiring a student to remove outer clothing). Any such patdown would be similar to a police "frisk" for weapons, but need not be limited to a search for weapons. Thus, a school official who has reasonable grounds to conduct a search could patdown a student's outer clothing to reveal or examine an unexplained bulge that could be any form of contraband or evidence of crime. Because this limited tactile search would not involve rearranging clothing to the point of exposing undergarments or the student's buttocks, anus, genitals, or female breasts, it would not be a strip search within the meaning of the new statute. As noted in Chapter 10.1, school officials nonetheless must proceed with great caution and restraint in conducting any form of a search that involves physically touching a student's person.